Supreme Court, U.S.
FILED
APR 18 1997
CLERK

Nº. 96-1498

In The
Supreme Court of The United States
October Term 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,
Petitioner,

v.

SCIOTO WATER, INC.; DANIEL R. GLICKMAN, Secretary, U.S. Department of Agriculture, Rural Economic and Community Developement Service (formerly Farmers Home Administration)
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit
Case Nº 95-3918

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*Susanne M. Cetrulo
WARE, BRYSON, WEST, BARTLETT, KUMMER & KNAPMEYER
157 Barnwood Drive
Edgewood, KY 41017
(606) 341-0255

**Counsel of Record*

LEGAL ADVANTAGE - 432 Walnut St. * Cincinnati, OH 45202

QUESTION PRESENTED

Can Water 1 state any claim for relief under 7 U.S.C. §1926(b), as amended by 7 U.S.C. 1929(a)(the Consolidated Farm and Rural Development Act of 1961 and the Agricultural Credit Act of 1987) when it has not been a federally indebted agency since 1989, but rather, chose to discount its prior indebtedness and obtain private funding?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. Statement of Facts 1

II. Proceedings Below 4

SUMMARY OF THE ARGUMENT 8

REASONS FOR DENYING THE PETITION 9

I. Petitioner is Attempting to Raise New Issues Which Were not Raised Before the Trial Court and are Therefore not Ripe for Appellate Review 9

II. The Decision of the Sixth Circuit Court of Appeals is in Complete Conformity with the Case Law and Legislative History of 7 U.S.C. §1926(B) 10

III. The Decision of the Sixth Circuit of Appeals Does not Conflict with the Decision of

Page

a Colorado State Court Which is Clearly Distinguishable on its Facts 16

IV. While the Sixth Circuit of Appeals Stated that this Case Created a Matter of First Impression in the Federal Courts, it did not Act Without Precedent or Authority. Its Determination is in Keeping with the Purposes and History of the Statute as Well as the Interpretation Given to it by the Agency Vested with Authority to Implement §1926(B) 19

V. The Present Case does not Present a Case of such Special Importance as to Require this Court to Grant Jurisdiction 21

CONCLUSION 25

APPENDIX

TABLE OF AUTHORITIES

Cases

Page

Bannert v. American Can Co., 525 F.2d 104 (6th Cir. 1975), cert. denied, 426 U.S. 942 9

Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2) (E.D.E.D. NC) 23

Chemical Manufacturer's Association v. Natural Resources Defense Council, 470 U.S. 116 (1985) 21

Chevron, USA, Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984) 19,20,21

City of Madison, Mississippi v. Bear Creek Water Assoc., 816 F.2d 1057 (5th Cir. 1987) 12,13,24

Glenpool Utility Services v. Water Dist. No. 2, 861 F.2d 1211 (10th Cir. 1988) cert. denied, 490 U.S. 1067 (1989). 12,13,14,24

Page

Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311 (7th Cir. 1989) 12

Mann v. Conlin, 22 F.3d 100 (6th Cir. 1994). 24

Maryland vs. Louisiana, 451 U.S. 725 (1981). 25

Mayer v. Mylod, 988 F.2d 635 (6th Cir. 1993) 24

North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910 (5th Cir 1996) 14

Pinehurst Enterprises v. Town of Southern Pine, 690 F.Supp. 444 (M.D.N.C. 1988) affirmed, 887 F.2d 1080 (4th Cir. 1989) 12,25

Rice vs. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70 (1955) 23

Rural Water Dist. No. 3 v. Owasso Utilities Authority, 530 F.Supp. 818 (M.D. Okla. 1979) 11,24

Statutes

Page

7 U.S.C.
Section 1926(b) . . . . . *passim*
Section 1929a . . . . . *passim*

28 U.S.C.
Section 1292(a)(1) 6

Farmers Home Administration Act
of 1961 10

Omnibus Reconciliation Act 20

Rules

Federal Rules of Civil Procecure
Rule 12(b)(6) 5,24

Rules of the Supreme Court
Rule 15 9
Rule 15(a) 23

Page

Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB (N.D.W.D. IA) 9

Singleton v. Huff, 428 U.S. 106 (1976) 9

U.S. v. Williams, 504 U.S. 36 (1992) 9

Ute Water Conservacy District v. City of Grand Junction, 900 P.2d 81 (Colo. 1985). 16,17

Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir. 1994) cert. denied, 1155 S.Ct. 2000 (1995) 19,24

Wyoming vs. Oklahoma, 502 U.S. 437 (1992). 25

Yee v. City of Escondido, 503 U.S. 519 (1992) 10

Young v. Community Nutrition Institute, 476 U.S. 974 (1986) 21

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The Respondent, Scioto Water, Inc., (SWI) does not accept the Petitioner's Statement of the Case. Accordingly, SWI submits the following statement of this matter:

The Scioto County Regional Water District ("WATER 1") was created in 1966 to provide water service to portions of a five township area in Eastern Scioto County and has provided service to this area since approximately 1967.[1] The original funding for the service of water by WATER 1 was obtained through FmHA loans in 1967, 1969, and 1973.

In 1969, Scioto Water, Inc. ("SWI") was created as a non-profit corporation with authority to install wells, and maintain and operate a water distribution system to meet the water needs of the residents of Scioto and Pike Counties and the rural areas in proximity thereto. With the knowledge, consent, and even assistance of WATER 1's prior

---

[1] Petitioners extended their lines into three additional townships in 1969 - 1970 without obtaining Ohio State Court approval as mandated by Ohio law. On July 19, 1996, however, Water One filed a Petition in the Ohio State Court to amend its service area. this filing occurred well after the commencement of the current action in Federal Court and is still pending. Accordingly, Respondent has counter-claimed contending Petitioner is outside of their service area and is infringing into SWI's protected territory.

management personnel, SWI was similarly funded through loans obtained from the Farmers Home Administration ("FmHA") since the early 1970's.

Since May of 1970, the two water services entities have maintained a contractual relationship with one another and serviced much of the same service areas. Until recently, SWI had never been a water producing entity but rather had purchased its water from WATER 1 and Portsmouth Water (another water association in this same service area) pursuant to contracts with these other agencies. However, SWI has consistently required more water than called for under the contracts in order to serve its customers. In the late 1980's, Water 1 began imposing costly and additional surcharges to the cost of SWI's purchased water. (See SWI's Answer and Counterclaim, Appendix, infra, 1a-28a)

For obvious reasons, SWI began looking at the feasibility of developing its own water source. In the early 1990's, SWI received approval and additional funding from the Farmers Home Administration to develop a wellfield two miles upstream from Water 1's wellfield and to build its own surface water treatment plant. Over the past few years, SWI has entered into loan agreements with the FmHA totalling more than two million dollars to fund this project. The water treatment facility was officially opened in April of 1995 and has operated successfully since then enabling more persons in this rural area to obtain water

service at a more competitive rate. No harm has resulted to Water 1 by virtue of this competitive facility.[2]

Nevertheless, Water 1 has taken the position that it is entitled to protections against impairment pursuant to 7 U.S.C 1926(b) and its progeny by virtue of its status as a former debtor of the FmHA. The problem with Water 1's position arises from its own knowing and voluntary decision back in 1989 to secure a substantial discount of the loans it then owed to the FmHA.

The FmHA, in 1989, instituted the Discount Purchase Program in an attempt to raise funds for this severely indebted federal agency. Debtors to the FmHA were informed by form letters that they could buy out of their FmHa debt at a substantial savings to them, or, in the alternative, could have their loans sold by the FmHA to third party purchasers. (See offering correspondence, Appendix, infra, 35a-54a) This notification from the government specified to current borrowers that if their debt was sold to third-party purchasers, those entities would still have and enjoy the protections of non-impairment provi-

---

[2] In fact, Water 1 withdrew its initial filing for a restraining order to prevent the opening of SWI's plant, conceding that it could not demonstrate any harm. (See Plaintiffs' Advisory to Court, Appendix, infra, 29a-34a).

sions of 7 U.S.C. 1926(b). [3] In contrast, then, if the borrowers elected the discount, by refinancing their own debt, they lost those protections.

Water 1 elected in 1989 to take advantage of the substantial discount, and obtained funding from a private source, Star Bank, to have its loans from the FmHA canceled, as paid in full. Once WATER 1 had secured a discount on the amounts it owed the FmHA by refinancing its obligation with non-federal funding sources, it was no longer considered a borrower of the FmHA. WATER 1 has not been so indebted to the FmHA since 1989. In contrast, SWI has continued to be an FmHA-indebted entity since 1971.

II. PROCEEDINGS BELOW

In 1993, SWI sought and obtained approval from the Ohio Environmental Protection Agency to proceed with its construction plans for a well field and treatment plant. WATER 1 filed several appeals with the Environmental Board of Review in efforts to block the approved construction. The Ohio Environmental Board of Review dismissed

---

[3] This continued protection was codified at 7 U.S.C. §1929 (a,g), amended in 1989, as follows:

> . . . 7 U.S.C. §1926(b) shall be applicable to all notes or other obligations sold or intended to be sold under this section. (Emphasis added).

WATER 1's complaint and the Petitioner further appealed that decision. No stay of SWI's construction was granted and the Franklin County Court of Appeals dismissed Water 1's complaint.

Accordingly, when all of these efforts had failed, WATER 1 addressed numerous correspondence to the FmHA advising it that its approval of the funding to SWI was improper. The FmHA respectfully disagreed and since March 27, 1995, the treatment plant of SWI has been fully operational and SWI has been fully indebted to the FmHA for millions of dollars.

It was, therefore, in March of 1995 that WATER 1 sought relief from the United States District Court, Southern District of Ohio, by filing its "Amended Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Mandamus". (Petitioners' Appendix 93a-108a) This Complaint was quickly followed by WATER 1's application for injunction and temporary restraining order against SWI and FmHA. In response, both SWI and the FmHA moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), asserting that the Complaint failed to state a claim upon which relief could be granted due to WATER 1's lack of standing or entitlement to the protections of 7 U.S.C. §1926(b). Because WATER 1 had filed an application for preliminary injunctive relief, the Trial Court set this matter for a preliminary injunction

hearing which was canceled when Water 1 advised the Court that SWI's projects did not, in fact, threaten its' aquifer or well fields. The sole question remaining was very simply:

> "Can WATER 1 state any claim for relief under 7 U.S.C. §1926(b) (as amended by 7 U.S.C. 1929(a) when it has not been a federally indebted agency since 1989?"

The Trial Judge for the Southern District Court of Ohio agreed with both Respondents herein that WATER 1 was not entitled to the protections of 7 U.S.C. §1926(b) and its amendments. In that Order, the Court below also concluded that WATER 1 failed to state a claim for relief pursuant to various other state and federal claims included within the Complaint.

The Court specifically held that this Order did not dispose of SWI's Counterclaim and application for its own protection pursuant to this same statute. With SWI's Counterclaim remaining before the Southern District of Ohio, WATER 1 filed its Notice of Appeal to the Sixth Circuit Court of Appeals, pursuant to 28 U.S.C. §1292(a)-(1). Although SWI objected to the appellate court's jurisdiction under that statute, the Sixth Circuit overruled the Motion to Dismiss and the case was again fully briefed and argued on the merits.

On December 18, 1996, that Court determined that WATER 1's appeal was without merit and that the District Court had properly entered judgment for SWI on its motion to dismiss for Water 1's failure to state a claim for relief under this statute. This Honorable Court should affirm all of the decisions below by denying the petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

Water 1 has instituted this action, as well as numerous other actions, aimed at eliminating competition from the non-profit, federally funded water association, SWI. The basis of Water 1's original action in the Southern District of Ohio was that it was entitled to continued protections against competition, or impairment, pursuant to 7 U.S.C. 1926(b). (See Petitioner's Appendix, Complaint, at 93a-125a, specifically 100a-103a). Based upon the prior case law interpreting this statute, the legislative history, the agency interpretation, and the particular facts of this case, the trial court and the Sixth Circuit Court of Appeals properly concluded that Water 1 had lost its once existent rights against curtailment by its own actions. Water 1, in 1989, voluntarily elected to discharge and extinguish its debt with the FmHA, and secure private financing, with resultant benefits and discounts to it. By doing so, Water 1 gave up the rights guaranteed to covered associations under 7 U.S.C. 1926(b), and is no longer able to state a claim for relief against this FmHA indebted association.

REASONS FOR DENYING THE PETITION

I. Petitioner is attempting to raise new issues which were not raised before the trial court and are therefore not ripe for appellate review.

Respondent, SWI, is required by Rule 15 of the Rules of this Court to raise any issue or objection to this Court's jurisdiction in the brief in opposition to the petition. SWI respectfully submits that Petitioner's arguments are not properly before this court due to its failure to comply with the basic tenets of appellate procedure that one cannot raise new issues and arguments on appeal which were not presented at the trial level. Bannert v. American Can Co., 525 F.2d 104 (6th Cir. 1975), cert. denied, 426 U.S. 942; U.S. v. Williams, 504 U.S. 36 (1992). As stated in Singleton v. Huff, 428 U.S. 106, (1976), this Court will not consider issues that a party fails to raise in the district court, absent extraordinary circumstances.

Water 1, in its' Appellant's Brief before the Sixth Circuit, raised for the first time a common law "right of first refusal" and engaged in an extensive argument on this issue which had never been advanced by Water 1 in the District Court. The Sixth Circuit Court of Appeals noted, at page 41 of its decision, that there was a question as to whether this argument had been raised below, at the trial level, or waived by Water 1. (See Petitioner's Appendix, 1a-10a). However, the appellate court went on to address

the merits, as did the respondent below. It is respectfully submitted that the petitioner's entire argument is not proper as it was not even asserted before the trial judge, the Honorable Sandra J. Beckwith. This Court wisely refuses to review judgments rendered below where the petitioner raises new issues and arguments that were not presented in the lower courts. Yee v. City of Escondido, 503 U.S. 519, 523-33 (1992). This is such a case and for that reason the writ should be denied.

II. The decision of the Sixth Circuit Court of Appeals is in complete conformity with the case law and legislative history of 7 U.S.C. §1926(B)

Both the trial court and the Sixth Circuit began their analysis of petitioner's claim under 7 U.S.C. §1926(b) with a review of the history of that statute, its purpose, and the cases interpreting it.

Congress, in the interest of establishing protection to borrowers of the federal government, enacted 7 U.S.C. §1926(b) of the Consolidated Farmers Home Administration Act of 1961. Under that statute, no entity, be it city, county, state, public or private company, can do anything to curtail or limit the water service of an indebted association and lessen its ability to repay a federally funded loan. By virtue of this entire Act, Congress provided a mechanism for rural areas to obtain low interest loans and grants for water facilities who had not previously been considered

good candidates for bank loans. The regulations and policies of this governmental agency set forth terms and conditions upon its loans, all in a clear effort to protect the federal government.

To specifically protect water associations indebted to the FmHA, 7 U.S.C. §1926(b) was enacted, and provides as follows:

> The service provided or made available through any such association shall not be curtailed or limited by the inclusion of the area within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of said loan; nor shall the happening of such event be the basis of requiring such association to secure a franchise or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (Emphasis added).

Although this section was adopted and enacted by Congress in the early 1960's, one of the first federal cases to discuss and interpret the Act was Rural Water Dist. No. 3 v. Owasso Utilities Authority, 530 F.Supp. 818 (M.D. Okla. 1979). In reviewing the Act, the Oklahoma District

Court considered the legislative history, the object of the legislation, the method adopted to accomplish that purpose, and the effect of the statute upon those it was intended to protect. Id. at 822-823. Considering all of those factors, which are set forth in detail in the Court's opinion, the Owasso Court specifically held that, "The United States, in the passage of the Agricultural Credit Act, has a paramount interest, not only in the supply of running household water in rural areas, but also for the repayment of funds advanced for the implementation of such systems". Id. at 823. The FmHA indebted water facility was held to be entitled to the protections of §1926(b). Id.

In a series of federal decisions issued in the late 1980's, the Courts were repeatedly faced with situations in which villages or municipalities were expanding and attempting to infringe upon rural areas and water associations protected by §1926(b). City of Madison, Mississippi v. Bear Creek Water Assoc., 816 F.2d 1057 (5th Cir. 1987); Glenpool Utility Services v. Water Dist. No. 2, 861 F.2d 1211 (10th Cir. 1988) cert. denied, 490 U.S. 1067 (1989); Pinehurst Enterprises v. Town of Southern Pine, 690 F.Supp. 444 (M.D.N.C. 1988) affirmed, 887 F.2d 1080 (4th Cir. 1989); Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311 (7th Cir. 1989). In many of these cases, the FmHA was the party which intervened in state actions or private disputes, bringing the matter to federal court, for purposes of protecting its borrowers.

The methods or means by which these municipalities were found to be violative of §1926(b) ranged from annexation to condemnation of the area. However, in each case where a violation of §1926(b) was found, the protected agency was still indebted to the FmHA.

In City of Madison, Mississippi v. Bear Creek Water Assoc., 816 F.2d 1057 (5th Cir. 1987), Bear Creek, a nonprofit corporation similar to SWI, had developed a water system financed by five loans from the FmHA. Id. The indebtedness had originated, as in the case at bar, in the early 70's and continued to the present date. Because the nearby city of Madison had grown and its boundaries now included a part of the area served by Bear Creek, the city instituted eminent domain proceedings to take Bear Creek's water facilities. Id. at 1058. In this logical analysis of §1926(b), the Fifth Circuit Court of Appeals held that the statute herein was unambiguous and clearly established a "bright line rule throughout the FmHA loan term". Id. at 1059.

Subsequently, the Tenth Circuit also agreed with the Fifth Circuit that §1926(b) only protects rural water associations having a continuing indebtedness to the FmHA. Glenpool Utility Services, Id. at 1214. The Tenth Circuit Court of Appeals made it quite clear that the limitations on curtailment or infringement upon a water association, as set

forth in §1926(b), are not permanent or exclusive as WATER 1 would have this Court believe. Quoting from Glenpool:

> It is clear that the protection of §1926(b) is "**a qualified and not an exclusive right. It is a right that is not permanent, but contingent upon the district's outstanding federal debt**." (Emphasis added). Id. at 1216.

More recently in North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910 (5th Cir. 1996), the Fifth Circuit again stated these principles as follows:

> "The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment." (Emphasis added). Id. at 914.

The question then presented to both of the courts below was whether Water 1 could still be considered to have "outstanding federal debt protections" when it had eliminated its outstanding federal debt.

As set forth in Petitioner's own Amended Complaint, debtors were offered two options by the FmHA. Debtors to the FmHA were informed by a detailed form letter (Appendix, infra, at 35a-54a) that they could refinance their own debt and secure a substantial discount by virtue of the refinancing OR debtors would have their debts sold by the FmHA to a third party purchaser. That form letter specifically advised former debtors that "third party purchasers of the debt from FmHA would be entitled to all of the rights and protections that existed prior to the sale, including the non-impairment provisions of 7 U.S.C. §1926-(b). As stated previously, those continued rights and protections were codified at 7 U.S.C. 1929(a)-(g). (See footnote 3, Id..).

WATER 1 does not dispute that it received notification from FmHA of the foregoing options. Neither does WATER 1 dispute that it elected the alternative of "refinancing its own debt" and thus received a substantial discount. In order to raise the funds necessary to refinance its debt, WATER 1 obtained funding from a private, third party source, Star Bank of Portsmouth.

Petitioner contends that since its notes were "purchased" by Star Bank of Portsmouth, it is still entitled to the protections and "right of first refusal" allegedly contained in Subsection (f) of 7 U.S.C. §1929(a). That subsection, however, refers only to notes sold or intended to be

sold "under this section." The entire section pertains to sales of loans by the FmHA and is focused on who buys the notes. A third party purchase does not cancel the notes if purchased by the issuer, but a refinancing, at a substantial discount, does cancel the notes.

The Courts below did properly look at the entire statutory scheme and found no support for Water 1's piecemeal approach to determining the intent of these provisions. The Courts below also properly considered the application and interpretation of these provisions by the previously cited cases, all of which have limited the protections of the original statute to the life of the loan with the FmHA.

III. The decision of the Sixth Circuit Court of Appeals does not conflict with the decision of a Colorado state court which is clearly distinguishable on its facts.

Water 1 then attempted to convince both courts below that a Colorado state court decision was binding and persuasive in support of its position.

As part of the Trial Court's detailed analysis and consideration of this Complaint, Judge Beckwith reviewed this then non-final case, produced by WATER 1's counsel, from the Colorado State Supreme Court. While recognizing

that Ute Water Conservacy District v. City of Grand Junction, 900 P.2d 81 (Colo. 1985) has no precedential value in this district, the Trial Court reviewed it in view of the dearth of authorities under §1929a.

In Ute Water, Id., the Colorado State Court did determine that a water district was entitled to protection even after it had purchased its bond from the FmHA. However, the Supreme Court of Colorado specifically found that §1926(b) applied to all notes and bonds sold by the FmHA including those reacquired by the issuer "with the intent not to discharge the instrument". Id. at 92. In reaching this specific and limited determination, the Colorado State Court looked to its version of the Uniform Commercial Code to answer the question of whether a bond is discharged when reacquired by the issuer. Id. at 93. That Court also looked to the "intent of the parties" therein. It specifically relied upon the testimony of bond counsel that the transaction in Ute Water, Id., was "structured" to effectuate an intent to "reacquire the bond without discharging" the underlying debt. Id. at 93. As a review of the transaction in this case will demonstrate, the FmHA simply endorsed the back of the revenue bond and transferred it to the district rather than marking the bond "paid in full", which "would have canceled or discharged the debt". Id.

The Sixth Circuit, also found Ute Water, Id., distinguishable from the case at bar, noting that the state court

relied upon Colorado law permitting a bond issuer to reacquire its own bond without extinguishing the debt. Unlike the loan documents in Ute Water, the loan documents in this case were marked "paid in full." Id. at 42.

If the FmHA had sold WATER 1's notes to a third party, the original loan documents and terms would clearly still be in existence and those terms themselves would dictate the extent and duration of statutory protections. Such notes would clearly be "sold or intended to be sold" as set forth in 7 U.S.C. §1929a(g). Instead, WATER 1's voluntary participation in the discount purchase program resulted in its loans being marked "paid in full" and canceled. If WATER 1's interpretation of §1929a were adopted by this Court, the Courts would further need to determine and create terms for the continued protections being sought herein. Would WATER 1's claimed protection be valid for the length of its debt with Star Bank or would it remain for the original term of the "canceled and paid in full" bonds from the FmHA?

The Courts below did not disregard the word "all" in the language of §1929a(g) as contended by WATER 1. On the other hand, neither did it ignore the words "sold or intended to be sold under this section" as Petitioner would have this Court do. The Courts, to the contrary, used the first rule of statutory construction and read the entire statute, as a whole. The Sixth Circuit concluded that when

an issuer buys back its own loan and cancels the debt, it no longer qualifies for the debtor protections afforded under Section 1926(b). This statutory interpretation is faithful to the main legislative purpose of the statute-safeguarding Farmers Home Administration loans. To rule otherwise and jeopardize the duly granted loans owed by SWI to the FmHA would actually thwart the purpose of the entire statute.

IV. While the Sixth Circuit Court of Appeals stated that this case created a matter of first impression in the Federal Courts, it did not act without precedent or authority. Its determination is in keeping with the purposes and history of the statute as well as the interpretation given to it by the agency vested with authority to implement § 1926(B).

The Petitioner, who is seeking to impose a particular statutory construction upon an agency charged with enforcing that statute, carries a heavy burden. As was held in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, at 843 (1984), courts should defer to an interpretation given by the agency charged with its administration so long as the interpretation is based on a permissible construction of the statute and does not frustrate congressional policy.

For instance, in Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir. 1994) cert. denied, 1155 S.Ct. 2000 (1995), the FmHA took the position, consistent with the Plaintiffs' position throughout this case, that the sale of the bond from the FmHA to a third party still continued the terms and conditions of the original loan and entitled the original debtor to the statutory protections. Id. The protections existed because the FmHA had sold the city's bond pursuant to the provisions of the Omnibus Reconciliation Act or § 1929a. Id. at 523.

The Sixth Circuit Court in that case, agreed and "accorded great deference to the FmHA's reasonable interpretation of that statute". Id. at 527, quoting Chevron, USA, Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984). In the present case, the FmHA has consistently stated that the debt of Water 1 was canceled in 1989 by it's refinancing with private funding sources. Water 1 presented no contrary evidence of an "intent to re-acquire" the bond in this instance, and the Courts below interpreted the statute and ruled in conformity with the interpretation of the Department of Agriculture.

WATER 1 must show that the interpretation embraced by the FmHA clearly contradicts the will of the legislature. Id. WATER 1 has not and cannot meet that burden. It is respectfully submitted that this case presents

an excellent case to apply the principles espoused in Chevron, Id..

In Young v. Community Nutrition Institute, 476 U.S. 974 (1986), this Court followed the Chevron principle and adopted the FDA's interpretation of an ambiguous statutory provision. In Chemical Manufacturer's Association v. Natural Resources Defense Council, 470 U.S. 116 (1985), this Court further affirmed that the view of the agency charged with administering the statute is entitled to considerable deference. As in all the afore-cited cases, the FmHA's interpretation is "sufficiently rational" to preclude a court from substituting its judgment for that of the agency. Chevron, Id..

V. The present case does not present a case of such special importance as to require this court to grant jurisdiction.

The buy-out scheme presented in this case took place in 1989. The FmHa has consistently applied the interpretation which it gave in this instance to similar situations presented since 1989. Its interpretation is in keeping with the overall purpose of the statute, is consistent with the form letters it sent to former debtors in the late 1980's, and preserves the protections of 1926(b) for the majority of funders; those third party purchasers who were

promised continued protections in the offering letter and the statute.

Water 1 would have this Court believe that the service areas of numerous water districts are threatened by the Sixth Circuit Court of Appeals decision in this case.[4] To the contrary, the decision below upholds and follows well established precedent that protects those water associations who are still indebted to the FmHa from the type of attacks which have been waged against SWI herein by competing, non-protected districts such as Water 1. The integrity and effectiveness of the loan program is only guaranteed if this Court finally puts a stop to the efforts of Water 1, and similar non-protected facilities, to somehow gain rights they have eliminated by their own knowing, informed, and voluntary buy-out of their loans.

Finally, WATER 1 asserts that this question raises an issue of much importance because it is "subject to repeated litigation in numerous different federal and state courts". (Petitioners brief, page 17). It is further stated therein that:

---

[4]In fact, even a reversal of the decisions rendered in this case would not determine the issues of the "service area" which were raised by SWI's counterclaim as well as the Petitioners' pending state action to define its service area by amendment of its petition.

> "Petitioner is advised that there are at least two lawsuits pending in the federal and state courts involving in some way the question presented in this Petition." (Petition for Writ, p. 17-18).

Once again, counsel for the Respondent is required to bring to this Court's attention any perceived misrepresentations of fact. Sup. Ct. Rule 15(a). It is respectfully submitted that Counsel for Petitioner is misrepresenting facts to this Court with the above statements.

A simple check of the two cases cited in Footnote 12 of the Petitioner's brief reveals that the only litigation raising this argument is that being pursued by Counsel for the Petitioner, Louis Rosenberg. A review of the pleadings filed in those two pending cases reveals that one does not involve the issue of continued protections after a discount buy-out by a formerly indebted water association. (See Appendix, infra, 55a-58a, Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2) (E.D.E.D. NC), where Atty. Rosenberg pleads that his client therein is still a federally indebted association). The other is currently pending on a summary judgment motion on similar grounds to those raised in this action. (See Appendix, infra, 59a-63a, Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB (N.D.W.D. IA),

containing portions of the Defendant's motion for summary judgment discussing the within decision).

This Court does not grant writs of certiorari to merely debate matters of intellectual or scholarly interest for the benefit of particular litigants. Rice vs. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70 (1955). Contrary to Petitioner's assertions, there is no conflict in decisions of the districts below.

The lower courts construed all of the facts in a light most favorable to the non-moving party, in this case, WATER 1, as required by Federal Rule of Civil Procedure 12(b)(6). Even with that analysis, the Court below properly found that there was no set of facts which would permit WATER 1 to recover under its claims pursuant to 7 U.S.C. §1926(b) or §1929a. Mayer v. Mylod, 988 F.2d 635 (6th Cir. 1993). Mann v. Conlin, 22 F.3d 100 (6th Cir. 1994).

Numerous opinions from virtually every circuit in this country have concurred that the purposes of the Agricultural Credit Act are to protect the supply of running water in rural areas and to protect the repayment of funds advanced for the implementation of those systems. Rural Water Dist. No. 3 v. Owasso Utils. Authority, 530 F. Supp. 818 (N.D. Okla. 1979); City of Madison v. Bear Creek, 816 F.2d 1057 (5th Cir. 1987); Glenpool Utility Services v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211 (10th

Cir. 1988) cert. denied, 490 U.S. 1067(1989). Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir., 1994) cert. denied, 1155 S.Ct. 2000 (1995).

All of these cases have found violations of 1926(b) only when the water districts were still indebted to the Farmers Home Administration. As stated in Pinehurst Enterprises, Inc. v. Town of Southern Pines, 690 F.Supp. 444 (M.D.N.C. 1988), aff'd., 887 F.2d 1080 (4th Cir. 1989), the first element of a violation of 1926(b) is limitation of the service provided by a "covered association" and Water 1 is not a covered association. The Sixth Circuit recognized that fact and went on to point out that it was not the Act which altered Water 1's current ineligibility for curtailment protection, it was the discharge, rather than the sale of the debt, by Water 1, that resulted in their loss of continued protections.

It is clear that this case, therefore, does not present a matter of such serious and important concern as to require this Court's exercise of jurisdiction. Maryland vs. Louisiana, 451 U.S. 725 (1981); Wyoming vs. Oklahoma, 502 U.S. 437 (1992).

CONCLUSION

The Courts below rejected WATER 1's argument that the one time existence of a loan with the FmHA entitled it to an exclusive service area ad infinitum. Water 1's position was not supported by the intent and purpose of the statute, by the agency interpretation of the statute, or by the intent of the parties as evidenced in a loan offering correspondence. The sole authority relied upon by Water 1 in both lower courts was found distinguishable on its facts, non-binding, and non-persuasive as authority.

Petitioner bears a heavy burden to persuade this highest court that this case presents an important issue, requiring a ruling in direct contravention of the purposes and intent of the legislative act. Water 1 has been given a reasonable opportunity below to present all material pertinent to the issues in order to attempt to meet the initial requirement of litigation, i.e., the ability to state a claim upon which relief might be granted.

The Courts below have fairly and exhaustively considered all of those materials and contentions and for all of the foregoing reasons, SWI respectfully requests that this Honorable Court affirm those decisions of the U.S. District Court and the Sixth Circuit Court of Appeals and deny this petition.

Respectfully submitted,

STEVEN L. MOWERY
THURL KEVIN BLUME
Mowery, Brown and Blume
8595 Ohio River Road, C.B. 83-05
Wheelersburg, Ohio 45694
(614) 574-2521

SUSANNE M. CETRULO
Ware, Bryson, West & Kummer
157 Barnwood Drive
Post Office Box 17718
Edgewood, Kentucky 41017
(606) 341-0255

APPENDIX CONTENTS

I. Answer, Counterclaim and Crossclaim of Defendant, Scioto Water,Inc. 1a-28a

II. Advisory to the Court and Suggestion for Scheduling Conference 29a-34a

III. Offering Correspondence from FmHA to all Debtors dated 1/10/1989 (JA, Vol. II, Ex. 9) 35a-54a

IV. Bell Arthur Water Corporation's Memorandum in Support of its Motion for 7 U.S.C.§1926(b) Summary Judgment on Liability Pursuant to Fed. R. Civ.P. 56(a), Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2) (E.D.E.D. NC) 55a-57a

V. Reply to Plaintiff's Response to City's Motion for Summary Judgment, Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB (N.D.W.D. IA) . . . 59a-63a

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ADVISORY TO THE COURT AND
SUGGESTION FOR SCHEDULING CONFERENCE

Pages 1a - 28a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1., AUTHORITY	:CASE NO. C-1-95-204 : :(Rubin, J.)
Plaintiff	:(Judge Beckwith, :sitting by designation)
v.	:
SCIOTO WATER, INC. and RICHARD ROMINGER, Acting Secretary, U.S. Department of Agriculture, Rural Economice and Community Development Service (formerly Farmers Home Administration)	:ANSWER, :COUNTERCLAIM :AND CROSSCLAIM :OF DEFENDANT, :SCIOTO WATER, :INC.
Defendants	:

Comes now Scioto Water, Inc. (hereinafter "SWI"), one of the Defendants herein, by and through counsel, and files its Answer to the Plaintiff's Complaint for temporary

restraining order, injunctive relief and mandamus as follows:

FIRST DEFENSE

The Complaint herein fails to state a claim upon this Defendant upon which relief may be granted and should therefore be dismissed.

SECOND DEFENSE

1. This Defendant admits the jurisdiction of this Court as set forth in Plaintiff's Complaint pursuant to 28 USC §1331, based upon federal question claims. The Defendant does not acknowledge that this Court has subject matter jurisdiction to determine Plaintiff's claim pursuant to 7 USC §1926(b) due to Plaintiff's lack of standing to assert an action under that section.

2. This Defendant denies that Plaintiff's supplemental state law claims are properly before this Court.

3. This Defendant acknowledges that venue is proper in this Court pursuant to 28 USC §1391(a).

4. In response to Plaintiff's Section IV, titled PARTIES, the Defendant admits that SCRWD was created as a regional water district but denies that the Plaintiff is properly existing and operating pursuant to the laws of the

State of Ohio. This Defendant admits the allegations contained in Paragraph 2 of Section IV and states that the allegation contained in Paragraph 3 of Section IV is not applicable to this answering Defendant and therefore requires no response.

5. This Defendant is without sufficient knowledge and information to form a belief as to the truth of the allegations set forth in Paragraphs 1, 2, 4, 8, and 9 of Section V of the Plaintiff's Complaint, titled FACTS and therefore denies same. In addition, to the extent that these paragraphs assert a legal conclusion, this Defendant specifically denies that the law is as set forth by the Plaintiff but states that this Court will make any such determination.

6. This Defendant specifically denies the allegations contained in Paragraphs 3, 7, 11, 12 and 14 of Section V.

7. This Defendant admits the allegations contained in Paragraph 5 to the extent that it sets forth the current water purchase contract by and between the Plaintiff and this Defendant. However, the Defendant specifically denies that the respective roles of the parties are as limited as is set forth in the Plaintiff's Complaint.

8. This Defendant admits the allegations contained in Paragraph 6 of Section V to the extent that it sets forth the surcharge enacted by the Plaintiff upon the Defendant

in 1988. This Defendant further admits that it has continued to pay the surcharge imposed by the Plaintiff but denies that the parties' respective roles are as limited as has been set forth in Plaintiff's Complaint.

9. This Defendant admits the allegations contained in Paragraphs 10 and 13 of Section V of the Plaintiff's Complaint.

10. This Defendant specifically denies all of the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of Section VI of the Plaintiff's Complaint which assert a violation of 7 USC §1926(b). In addition, to the extent that these paragraphs assert legal conclusions, this Defendant states that the Court shall make any such determination on those issues.

11. This Defendant specifically denies the allegations contained in Paragraphs 1 and 2 of Count VII of Plaintiff's Complaint, titled VIOLATION OF ICA.

12. Plaintiff's Paragraph 1, Section VIII, fails to set forth any allegation which requires a response from this Defendant.

13. The Plaintiff's Paragraphs 1 and 2 of Section IX, titled ATTORNEY'S FEES, similarly fails to set forth any basis for a claim against this Defendant but to the

extent that it attempts to, this Defendant specifically denies those allegations.

14. As set forth previously, this Defendant denies that this Court has supplemental jurisdiction over the state law claims as set forth Paragraphs 1 and 2 of Section X of Plaintiff's Complaint.

15. This Defendant specifically denies the allegations contained in Paragraphs 1, 3 and 4 of Section XI of Plaintiff's Complaint.

16. This Defendant affirmatively alleges that to the extent that Paragraph 2 of Section XI asserts a legal conclusion, a Court should make that determination.

17. This Defendant specifically denies the allegations contained in Paragraphs 1, 2, 3, and 4 of Section XII of Plaintiff's Complaint.

THIRD DEFENSE

The Plaintiff's Complaint herein is barred by Plaintiff's lack of standing or right or capacity to assert this action and therefore should be dismissed.

FOURTH DEFENSE

Plaintiff's action is barred by lack of subject matter jurisdiction of this Court.

FIFTH DEFENSE

Plaintiff's action is barred by the doctrines of waiver and estoppel.

SIXTH DEFENSE

Plaintiff's claims are barred by its failure to join necessary and/or indispensable parties pursuant to Rule 19 of the Federal Rules of Civil Procedure.

SEVENTH DEFENSE

Plaintiff's acts are ultra vires, or beyond the scope of the power of the Plaintiff association and therefore should be barred.

EIGHTH DEFENSE

Plaintiff's claims are premature as there has been no breach of contract nor any violation of any of the acts alleged in Plaintiff's Complaint by this Defendant.

NINTH DEFENSE

Plaintiff's Complaint is barred by the doctrine of collateral estoppel in that most of Plaintiff's allegations have previously been decided by the proper decision making authority within the State of Ohio and cannot now be relitigated.

TENTH DEFENSE

Plaintiff's claims are barred by its failure to exhaust administrative remedies.

ELEVENTH DEFENSE

Plaintiff's claims, if accepted and permitted by this Court, would constitute or result in a violation of the Sherman Antitrust Act (15 USC §1 and 2), the Clayton Act (15 USC §12), and the Valentine Act (ORC 1331), prohibiting anticompetitive and monopolistic conduct.

TWELFTH DEFENSE

Plaintiff's claims, or some of them, may be barred by the applicable statute of limitations.

THIRTEENTH DEFENSE

This Defendant reserves the right to supplement its Answer and assert any other affirmative defense to which it may become aware throughout discovery.

WHEREFORE, the Defendant, Scioto Water, Inc., having fully answered, prays this Honorable Court to:

A. Dismiss the Plaintiff's Complaint against it, at Plaintiff's costs;

B. Deny Plaintiff's request for declaratory and/or injunctive relief for the primary reason that Plaintiff has failed to state a claim upon which relief may be granted;

C. Declare that the result of such relief would be to put the parties in the position of violating provisions of 15 USC §12 and/or USC §1 (the Sherman Act and Clayton Acts);

D. Grant attorneys' fees to the Defendant herein, as the successful party pursuant to 28 USC §2412 and 28 USC §2202; and

E. Award any and all other relief to which this Defendant may appear entitled.

VERIFIED COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES now Scioto Water, Inc. ("SWI"), one of the Defendants herein, by and through its undersigned counsel, and for its Counterclaim for Declaratory and Injunctive Relief, states as follows:

I. PRELIMINARY STATEMENT AS TO JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief pursuant to Title 28 USC §2201 and §2202 and, in the alternative, Ohio Revised Code Section 2721.02, filed by Defendant, SWI, in order to protect its service area from encroachment or curtailment by Plaintiff, Scioto County Regional Water District No. 1, Authority (hereinafter referred to as "SCRWD") in violation of Title 7 USC §1926(b). This Court has original and supplemental jurisdiction of this cause of action by the Defendant pursuant to Title 28 USC §1331, 1337 and 1367.

2. Venue is proper in this Court pursuant to Title 28 U.S.C. Section 1391.

II. PARTIES

3. Defendant and Counterclaimant, SWI, is a non-profit corporation existing under the laws of the State of Ohio by virtue of Articles of Incorporation issued on October 10, 1969, and having its principal place of business in Wheelersburg, Scioto County, Ohio.

4. Plaintiff, SCRWD, was originally created pursuant to Ohio Revised Code Chapter 6119 and said Plaintiff is acting as a political subdivision with its principal place of business in Lucasville, Scioto County, Ohio.

5. Defendant, Richard Rominger, is Acting Secretary of the Department of Agriculture, involved in this instance, through the Rural Economic and Community Development Service, formerly Farmers Home Administration, an agency of the United States Department of Agriculture. The department may be served with process by serving its Acting Secretary, Richard Rominger, the Administration Building, Room 200A, 14th Street and Independence Avenue, S.W. Washington, D.C. 20250.

III. FACTS

6. Scioto Water, Inc., was organized and created in 1969 by a group of residents and property owners in Scioto County, Ohio, to seek a solution to a lack of an adequate domestic water supply in the outlying regions of Scioto County and Pike County and rural areas in proximity

thereto, with those regions lying outside the area served by then existing water lines of SCRWD and the City of Portsmouth.

7. Incorporated on October 10, 1969, SWI is an Ohio not-for-profit water distribution company that has continued to provide domestic water distribution service to residents of Scioto County, Pike County and Jackson County, Ohio since 1969.

8. Pursuant to its Articles of Incorporation, SWI was created and authorized to drill wells, purify, filtrate, buy, sell, and distribute water and to provide the inhabitants of Scioto County, Pike County, and rural areas in proximity thereto with water. The Articles of Incorporation are attached hereto and incorporated herein as **Defendant's Exhibit 1**.

9. From its inception, SWI's construction and expansion of its water distribution system, including the wellfield and water treatment plant, have been financed primarily through a series of secured loans that have been extended periodically by the United States Farmers Home Administration (hereinafter referred to as "FmHA") to SWI, pursuant to the provisions of Title 7 USC §1921, et seq. On January 11, 1974, SWI received loan funds from FmHA for the purpose of financing the construction of SWI's

water distribution system, with said loan funds consisting of the following:

- 40-year loans were granted bearing Loan Nos. 91-01, 91-02, 91-04, 9105, 91-06, 91-07, and 91-09, all in the principal amount of $3,748,000.

Subsequent thereto, SWI has obtained additional loans from FmHA, consisting of the following:

- 35-year loan dated November 7, 1979, bearing Loan No. 91-14 in the principal amount of $305,878.00;

- 40-year loan dated November 13, 1989, bearing Loan No. 91-10 in the amount of $402,000.00;

- 40-year loan dated January 27, 1982, bearing Loan No. 91-15 in the amount of $367,500.00;

- 40-year loan dated March 22, 1984, bearing Loan No. 91-16 in the principal amount of $430,500.00;

- 40-year loan dated June 28, 1988, bearing Loan No. 91-17 in the principal amount of $804,000.00;

- 40-year loan dated May 31, 1994, bearing Loan No. 91-21 in the amount of $2,000,000.00; and

- 40-year loan dated May 31, 1994, bearing Loan No. 91-25 in the principal amount of $500,000.00.

At present, SWI still owes FmHA approximately $7,000,000.00, with the final payment of principal and interest not due until the year 2034. SWI further anticipates applying in the future for additional loans from the FmHA in order to continue its expansion of service to the outlying regions of Scioto County and Pike County, Ohio and the rural areas in proximity thereto.

10. Each of the above FmHA loans was used by SWI to construct new water distribution lines and facilities, and each loan was secured by a mortgage on the real estate owned by SWI and a security interest in all of the water distribution lines and facilities owned by SWI, including those facilities to be built with the proceeds of each of the loans. (See mortgage of SWI and FmHA, attached hereto and incorporated herein as **Defendant's Exhibit 2**).

11. Pursuant to Title 7 USC §1926(a)(3), the application to the FmHA for the water treatment plan and wellfield was submitted, pursuant to Section 1926 to:

> The multi-jurisdictional substate area wide general purpose planning and development agency that has been officially designated as a clearing house agency under Office of Management and Budget Circular A-95 (the "clearing house agency") and to the county or municipal government having jurisdiction over the area in which the proposed project is to be located for review and comment . . . concerning among other considerations, the effect of the project upon the area wide goals and plans of such agency or government. . .

12. On January 6, 1993, the Ohio Valley Regional Development Commission, acting as clearing house agency convened a meeting with SCRWD, SWI, and the City of Portsmouth Water System on the wellfield and water treatment plan project. As a result of this meeting, the clearing house agency approved the project, as evidenced by the attached **Defendant's Exhibit 3**, incorporated herein by reference.

13. As long as SWI remains an FmHA financed water association, pursuant to Title 7 USC §1926(b) the water service provided and made available by SWI may not be:

> . . . curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event by the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the areas served by the association at the time of the occurrence of such event.

14. SWI's initial water distribution system was constructed in 1970 and 1971 and included transmission and distribution lines, storage tanks, and meters with designs based on projections that there would be growth in the number of its customers and in residential and commercial development in the area. This expectation has been supported by the historical development of the system, as SWI services and facilities have expanded from approximately 150 miles of water lines, serving approximately 750 customers in Scioto County and Pike County, to approximately 540 miles of piping and distribution lines, serving

approximately 5,200 customers in Scioto County, Pike County, and Jackson County.

15. Plaintiff, SCRWD, has served as the water provider and seller of water under a contract with Defendant, SWI, said contract being dated May 7, 1970. Defendant, SWI, has historically and continues to be the water purchaser or buyer under said contract with the Plaintiff. The contract and its amendment on August 20, 1981, provides that Defendant, SWI, will purchase a minimum of 5.25 million gallons of water per month from the Plaintiff and a maximum of 10 million gallons per month from the Plaintiff. The current rate for the purchase of said water is 93 cents per thousand gallons. In addition to the 93 cents per thousand gallons, however, the Plaintiff has enacted a surcharge for water usage by SWI for any amounts over the enumerated 1981 maximum of 10 million gallons per month, with the surcharge being the sum of 42 cents per thousand gallons in addition to the base rate of 93 cents per thousand gallons, for a total of $1.35 per thousand gallons over the contract maximum. This surcharge has been unilaterally established by the Plaintiff.

16. In an effort to improve its own facilities and reduce the amount of water it must purchase at wholesale with the overcharge and surcharge assessed by the Plaintiff, SWI initiated a review of alternate water sources in 1990. This review resulted in the decision to construct its own

wellfield and water treatment facility and reduce the amount of water it must purchase at wholesale in order to further expand and more efficiently service its customer base.

17. Plaintiff, SCRWD, was established in portions of a five (5) township area of Scioto County, Ohio by court order of the Scioto County, Ohio, Court of Common Pleas dated November 28, 1966. The unmodified non-exclusive defined area of its district is described in the referenced Court order as follows:

> All of Jefferson Township, Harrison Township, and Madison Township, that portion of Valley Township east of the Scioto River, and that portion of Clay Township extending from and including the unincorporated area known as Twin Valley, north on State Route 139 to the north line of Clay Township and extending from State Route 139 easterly and westerly to serve areas not presently served by the City of Portsmouth. (See attached **Defendant's Exhibit 4**).

18. Historically, SWI and SCRWD have expanded their respective distribution systems and co-existed in Scioto County without a great deal of conflict between the two. The two entities have served adjoining but totally separate service areas within Scioto County with the knowledge and

acquiescence of SCRWD as reflected in the Plaintiff's water service map of 1978, attached hereto as **Defendant's Exhibit 5**.

19. SWI has received its operational permit from the Ohio Environmental Protection Agency and all other necessary approvals to commence its operation of its newly constructed wellfield and water treatment plant, with the operation of said wellfield and treatment plant commencing on or about March 30, 1995. Through the operation of its wellfield and water treatment plant, SWI has not served, does not serve, and does not intend to serve customers currently served by SCRWD.

COUNT I

20. Defendant, SWI, incorporates by reference as if fully rewritten herein, all of the allegations and averments set forth above.

21. Defendant, SWI, is an FmHA indebted water association and is therefore entitled to the protections afforded FmHA borrowers against impairment and infringement of its service area pursuant to 7 U.S.C. Section 1926(b).

22. Plaintiff SCRWD's initiation of the above-styled action through the filing of its Complaint, Request for Preliminary Injunctive Relief, and Temporary Restrain-

ing Order, are all activities which are in violation of 7 USC §1926(b) and which operate to the prejudice and irreparable injury of Defendant, SWI. In the event that the Plaintiff's Motion for Preliminary Injunctive Relief or Temporary Restraining Order is granted, SWI will suffer curtailment and impairment of its ability to repay its FmHA indebtedness. (See Affidavit of Donald Spradlin, **Defendant's Exhibit 6**).

23. In the event that the Plaintiff's Motion for Preliminary Injunctive Relief or Temporary Restraining Order is granted, or in the event the Plaintiff prevails on its Complaint, Defendant, SWI, an FmHA borrower, will be unable to service the FmHA and OEPA approved outlying regions of Scioto, Pike and Jackson County, Ohio.

24. The Petition and Plan of Operation for Plaintiff, SCRWD, approved by the Scioto County, Ohio, Court of Common Pleas specifically limited the territory of SCRWD to portions of a five township area in Scioto County, being the Townships of Jefferson, Harrison, Madison, Valley, and Clay.

25. Without approval of the Scioto County, Ohio, Court of Common Pleas, without statutory authority, and in direct violation of Ohio Revised Code §6119.05 and 6119.051, Plaintiff, SCRWD, has expanded and extended its water lines and water distribution facilities into the Town-

ships of Porter, Bloom and Vernon. This expansion and intrusion is evidenced by the Plaintiff's own pleadings and admissions, as well as the service area map of the Plaintiff issued in 1978 and attached hereto as **Defendant's Exhibit 5**.

26. The Townships of Vernon, Bloom and Porter, located within Scioto County, Ohio, are townships clearly within the service area of SWI, an FmHA indebted water association, as described in the Articles of Incorporation of SWI and are further clearly outside the established water district of the Plaintiff.

27. The extension and expansion of SCRWD into the Townships of Porter, Bloom and Vernon within Scioto County, Ohio are intrusions into the service area of SWI, in violation of 7 USC §1926(b). Said intrusions curtail and limit the service area of SWI and consequently, have curtailed and limited the ability of SWI to repay its existing FmHA indebtedness.

28. Plaintiff, SCRWD, acting through its authorized agents, has engaged in vigorous activities and efforts to interfere with, terminate, and impede the plans of SWI to construct its own wellfield and water treatment plant, including numerous correspondences to FmHA officials on a regional, state and federal level, with state clearing house officials, township trustees, and various other governmental

agencies, state and federal legislators and the Environmental Protection Agency. In addition, the Plaintiff has filed appeals to the Environmental Protection Agency, Ohio Valley Regional Development Commission, Environmental Board of Review, and the Franklin County Court of Appeals, all in an effort to defeat the plans of SWI to develop its own water producing capability.

29. The efforts of the Plaintiff, SCRWD, as above-described, are motivated by SCRWD's desire to retain SWI as its second largest bulk water purchaser.

30. SCRWD has engaged in activities as above--described, which are clearly intended to curtail and impair the ability of SWI to service its customers and to reduce its water rates for its current customers and projected future customers. The actions of SCRWD have consequently curtailed and impaired SWI's ability to repay its current FmHA indebtedness.

COUNT TWO

31. Defendant, SWI, incorporates by reference as if fully rewritten herein all of the allegations and averments set forth above.

32. Defendant, SWI, contends that the Plaintiff has engaged in anti-competitive and monopolistic conduct in direct violation of 15 USC §1 and §2.

COUNT THREE

33. Defendant, SWI, incorporates by reference as if fully rewritten herein, all of the allegations and averments set forth above.

34. Defendant asserts that Plaintiff, acting through its authorized agents, has maliciously and tortiously interfered with the contract relationship between Defendant, SWI, and FmHA and has engaged in activities specifically designed to encourage or create a breach of said contract relationship between SWI and FmHA.

35. Defendant asserts that Plaintiff, acting through its authorized agents, has authored and forwarded numerous correspondences to various agencies, including Defendant, U. S. Department of Agriculture, seeking the withholding of committed funds for the construction project of Defendant, SWI, and encouraging and fostering a breach of the contract between Defendant, SWI, and Defendant, FmHA, as evidenced by the attached exhibits.

IV. ATTORNEYS' FEES

36. As a result of the conduct of the Plaintiff, SWI has found it necessary to retain the services of counsel.

37. Upon final trial or decision in this action, Defendant, SWI, seeks recovery of its attorneys' fees and costs pursuant to the Declaratory Judgment Act, 28 USC §2201 and Equal Access to Justice Act, 28 USC §2412.

WHEREFORE, Defendant, Scioto Water, Inc., requests that the Court issue a declaration and judgment pursuant to the Federal Declaratory Judgment Act as follows:

A. That the Defendant, SWI, is currently indebted to FmHA and is entitled to the protections against impairment or infringement upon its service area, pursuant to 7 USC §1926(b);

B. That the construction and operation of the wellfield and water treatment facility by Defendant, SWI, in Valley Township, Scioto County, Ohio, is protected from curtailment by the Plaintiff pursuant to 7 USC §1926(b);

C. That the Plaintiff, SCRWD, is not currently indebted to FmHA and is not entitled to the protections afforded to FmHA borrowers under 7 USC §1926(b);

D. That the Court declare that Defendant, SWI, has the right to provide water service to new customers which are currently unserved by any other water entity, including

the Plaintiff, and which are included within the FmHA and Ohio Environmental Protection Agency plans for Phase I and Phase II of the water distribution project.

E. That Plaintiff, SCRWD, its agents and employees and anyone acting under their direction be preliminarily and permanently enjoined from interfering with the operation of the wellfield and water treatment plant constructed by the Defendant, SWI.

F. That SCRWD be similarly enjoined from interfering with any contract between SWI and FmHA.

G. That SCRWD be similarly enjoined from continuing its intrusion into the service area of SWI and from providing water service outside its court created water district; and

H. That SCRWD be ordered to transfer, convey and deed its transmission lines and properties located within the Townships of Porter, Vernon and Blume in Scioto County, Ohio to Defendant, SWI, as said transmission lines and facilities lie outside the court created water district.

I. That Defendant, SWI, be awarded its reasonable expenses incurred in this action, including costs and attorneys' fees, and any and all other relief to which Defendant, SWI, may be entitled at equity or law.

CROSS CLAIM AGAINST DEFENDANT, RICHARD ROMINGER,THROUGH THE RURAL ECONOMIC AND COMMUNITY DEVELOPMENT SERVICE FORMERLY KNOWN AS THE FARMERS HOME ADMINISTRATION

Comes now the Defendant, Scioto Water, Inc., by and through counsel, and for its Cross Claim against the Defendant, FmHA, states as follows:

1. Defendant, SWI, incorporates by reference as if fully rewritten herein, all of the allegations and averments set forth above.

2. That the Plaintiff, SCRWD, has filed a Complaint against both SWI and FmHA, asserting that SWI has violated 7 USC §1926(b), by virtue of its expansion and construction of its own water wellfields in the rural portions of Scioto and Pike Counties.

3. That if the Plaintiff should recover a judgment against this Defendant, which this Defendant affirmatively denies, then the Defendant, SWI, is entitled to a judgment against the Defendant, FmHA, for indemnification and/or contribution in full, including attorneys' fees and court costs for all sums which this Defendant could be adjudged liable to the Plaintiff.

WHEREFORE, the Defendant, Scioto Water, Inc., prays as follows:

A. That the Complaint against it be dismissed;

B. For recovery on its Counterclaim against the Plaintiff;

C. In the alternative, for recovery on its Cross Claim against FmHA;

D. For its costs herein expended, including attorneys' fees; and

E. For any and all other relief to which this Defendant may appear entitled.

Respectfully submitted,

MOWERY, BROWN and BLUME
8595 Ohio River Road, C.B. 83-05
Wheelersburg, Ohio 45694
(614) 574-2687

STEVEN L. MOWERY (0029265)
Trial Attorney for Defendant

THURL KEVIN BLUME
Co-counsel for Defendant

WARE, BRYSON, WEST & KUMMER
157 Barnwood Drive
Post Office Box 17718
Edgewood, KY 41017
(606) 341-0255

SUSANNE M. CETRULO (0029556)
Co-Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was this ____ day of May, 1995, served by first class mail, postage prepaid upon the following:

John W. Hust, Esq.
Trial Attorney for Plaintiff
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
Governor's Knoll
11935 Mason Road, Suite 110
Cincinnati, Ohio 45249

Louis T. Rosenberg, Esq.
Trial Attorney for Plaintiff

LOUIS T. ROSENBERG, P.C.
De Mazieres Building
322 Martinez Street
San Antonio, Texas 78205

Edmund A. Sargass, Jr., Esq.
James M. Coombe, Esq.
U.S. Attorney's Office
220 U.S. Post Office Courthouse
100 East Fifth Street
Cincinnati, OH 45202

Hon. Janet Reno
U.S. Attorney General
Department of Justice
10th and Constitution Ave., N.W.
Room 511
Washington, D.C. 20053

SUSANNE M. CETRULO

APPENDIX II

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ADVISORY TO THE COURT AND
SUGGESTION FOR SCHEDULING CONFERENCE

Pages 29a - 34a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY	§	CASE NO
REGIONAL WATER	§	C-1-95-204
DISTRICT NO.1	§	(Beckwith, J.)
AUTHORITY	§	
	§	
Plaintiff	§	
vs.	§	ADVISORY TO THE
	§	COURT AND
SCIOTO WATER, INC.	§	SUGGESTION FOR
	§	SCHEDULING
Defendant	§	CONFERENCE
and	§	
	§	
DANIEL R. GLICKMAN	§	
Secretary US Dept.	§	
of Agriculture,	§	
Rural Economic and	§	
Community Development	§	
Service (formerly	§	
Farmers Home	§	
Administration)	§	
	§	
Defendant	§	

COMES NOW the Plaintiff, Scioto County Regional Water District No. 1, Authority ("WATER 1"), by and through counsel, and advises this Court of the lack of necessity of going forward with the hearing on Plaintiff's Application for Preliminary Injunctive Relief on August 14, 1995 and suggests the Court hold a scheduling conference between the Court and counsel.

I.

1. Plaintiff advises the Court that because of information developed during recent discovery depositions, it is not necessary or appropriate to proceed with the hearing on August 14, 1995, on Plaintiff's Application for Preliminary Injunction.

2. July 10 and July 12 depositions of Bill Peak and Wayne Cannon, U.S. Department of Agriculture, Rural Economic and Community Development Service ("RECDS-") (formerly Farmers Home Administration) disclosed that Scioto Water, Inc.'s treatment facility was built to produce only 1,000,000 gallons per day. Before redesign, necessitated by cost overruns, the facility was designed to produce 2,000,000 gallons per day and, this was illustrated by previously available Farmers Home Administration documentation. Under present treatment plant capacity limitations, the level of production of one million gallons per day

does not immediately threaten the Plaintiff's aquifer and its wellfield capacity.

3. Phase II of SWI's project presently is under review at the RECDS. Until SWI proposes and RECDS agrees to review application for increased capacity of the 1,000,000 gallons per day water treatment plant, or increased wellfield usage, immediate injury to Plaintiff is more distant.

4. In candor, Plaintiff reports to the Court, in light of these facts, the Plaintiff is not likely to establish immediate harm as a required element to justify preliminary relief. As a consequence, the Plaintiff's requested hearing date, now set for August 14, 1995, should be relinquished to the Court's use for more pressing matters.

II.

1. Additionally, as Plaintiff has previously stated within written pleadings previously filed, it is preparing two (2) separate motions for summary judgment for which July 10 and July 12 deposition testimony is necessarily required. These Fed. R. Civ. P. § 56(c) motions are to be filed upon receipt of the July 10 and 12 deposition transcriptions.

2. Finally, as the Court is well aware, there are now substantive motions presently pending before the Court. A

resolution of these and the additional motions will serve to narrow the issues that may require a later hearing, and trial and, in the meantime, encourage resolution of the issues by settlement. Plaintiff concurs with a suggestion previously twice made in conference with the Court by counsel for FmHA that the Court consider the substantive motions before proceeding with the further hearing to simplify the proceeding and reduce the costs of further case development, including preparation and presentation of live witnesses.

III.

For the above reasons, Plaintiff advises the Court that the hearing scheduled for August 14, 1995 to consider Plaintiff's Application for preliminary Injunction is no longer required. However, Plaintiff respectfully suggests to the Court consideration of a scheduling conference in the interest of judicial economy and minimizing expense to the parties.

WHEREFORE PREMISES CONSIDERED Plaintiff prays the Court, upon consultation with parties, consider a scheduling conference to address the issues set forth herein.

Respectfully submitted,

John W. Hust, Esq.
State Bar No. 0027121
Schroeder, Maundrell,
Barbiere & Powers
Governor's Knoll
11935 Mason Road, Suite 110
Cincinnati, OH 45249-8950
(513) 583-4209

TRIAL ATTORNEY FOR
PLAINTIFF
SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1

Louis T. Rosenberg, Esq.
Texas State Bar No. 17271300
LOUIS T. ROSENBERG, P.C.
De Mazieres Building
322 Martinez Street
San Antonio, Texas 78205

TRIAL ATTORNEY FOR
PLAINTIFF
SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon the following by regular mail on this the 20th day of July, 1995.

Stephen L. Mowery, Esq.
Mowery, Brown and Blume
Attorneys at Law
8595 Ohio River Road
Wheelersburg, Ohio 45694
Attorney for Scioto Water, Inc.

Susanne M. Cetrulo, Esq.
Attorney at Law
157 Barnwood Drive
Edgewood, Kentucky 41017
Attorney for Scioto Water, Inc.

James Coombe, U.S. Attorney
U.S. Attorney's Office
Potter Street Building, Room 220
Cincinnati, OH 45202
Attorney for U.S. Dept. of Agriculture

LOUIS T. ROSENBERG

APPENDIX III

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ADVISORY TO THE COURT AND
SUGGESTION FOR SCHEDULING CONFERENCE
(JA, VOL. II, EX. 9)

Pages 35a - 54a

IMPORTANT INFORMATION CONCERNING YOUR OPPORTUNITY TO PREPAY FARMERS HOME ADMINISTRATION LOAN AT A DISCOUNT

PLEASE READ CAREFULLY

January 10, 1989

Dear Community Programs Borrower:

Farmers Home Administration (FmHA) is please to announce a Discount Purchase Program (DPP) for 1989. FmHa is required by law to sell sufficient Community Programs loans to realize net proceeds in Fiscal Year (FY) 1989 of $584 million. FmHA intends to raise this amount by first offering Community Programs Borrowers an opportunity to purchase their FmHA loans at a discount, subject to certain conditions and restrictions. The attached Discount Purchase Program Description provides more specific information about the program. If the DPP fails to produce the total amount of proceeds required, FmHA plans to conduct some type of third party loan sale.

If you purchase your loans between January 10, 1989, and March 9, 1989, no deposit is required. If you want to purchase your loan between March 10, 1989, and May 9, 1989, a Good Faith Deposit of 5 percent of the outstanding

loan balance must be received in the FmHA District Office by March 9, 1989. Good Faith Deposits received in the District Office after march 9, 1989, will not be processed and will be returned to the borrower. The deadline for purchasing your loan under this program is May 9, 1989.

Potential advantages of participating in the Discount Purchase Program include:

1. Buying your loans at a discounted price may result in saving your community money. Normally, FmHA only permits redemption of loans at the full outstanding balance (par).

2. You avoid the future possibility of FmHA requiring you to refinance (graduate) your loans at par.

3. Purchase of your loans will free you of certain financial and audit reporting requirements contained in the loan documents.

4. Only funds in excess of the current reserve requirements may be used for the Good Faith Deposit. However, monies that relate strictly to the loans being purchased that you may already have in escrow or reserve funds may be used to complete the purchase of your loans. For example, if you

have any funds in low-yielding accounts and investments, these funds could be used to retire your loans at a potentially favorable price.

Community Programs Borrower

5. Purchase of loans does not preclude you from obtaining future loans from FmHA, providing you meet FmHA eligibility requirements.

You are urged to undertake a careful financial analysis before deciding to prepay. Depending on the terms of your particularly loan(s), the terms of any new financing required plus the transaction fees and costs may outweigh the potential benefits from the Discount Purchase Program. Therefore, we strongly encourage any borrower considering a purchase to consult with its financial advisors before proceeding.

A system of Pricing Grids will be used to determine the price of each loan. The Grids are based on a standard present value calculation using a number of uniform assumptions. Therefore, a present value calculation of the cash flow of your particular loan may vary from the price offered by FmHA if the characteristics of your loan are different from the assumptions used in the Grids. However, a price based on the Pricing Grids constitutes FmHA's offer and will be utilized, without exception, for all borrowers

who purchase their loans at a discount in this year's program.

A detailed explanation of how to use the Pricing Grids is enclosed. The Pricing Grids included with this letter are provided so that you may estimate your discount. Actual final pricing information will be available to you through your FmHA District Office.

As we indicated, depending on the level of interest in the Discount Purchase Program, FmHA may need to conduct a third party sale later this year. You should be reassured that in the event your loan is sold, the legislation mandating the sales affords a number of important protections. The terms and conditions of the loans will not change, except that the new holder cannot require a current borrower to refinance (graduate) its loan in the private sector (something FmHA can do if it continues to hold the loan). Borrowers will have essentially the same rights, privileges, and obligations after the sale and the sale program does not change a borrower's eligibility to borrow from FmHA in the future.

We hope that this overview of FmHA loan sale programs is helpful to you and we look forward to working with you in the future.

Sincerely,

LA VERNE AUSMAN
Acting Administrator

Enclosures

ATTACHMENT A

FmHA DISCOUNT PURCHASE PROGRAM
DESCRIPTIO

The Farmers Home Administration's (FmHA) Discount Purchase Program (DPP) provides most Community Programs borrowers the opportunity to buy back one or more of their loans at a potentially attractive discount price.

I. ELIGIBILITY/RESTRICTIONS

1. Only Water and Waste Disposal and Community Facilities loans may be purchased at a discount.

2. If a loan is delinquent, the amount delinquent must be paid off at par at the time the loan is purchased PRIOR to any discount being applied to the remaining balance. For the purposes of the DPP, a loan is considered delinquent whenever a scheduled pay-

ment (as determined by the debt instrument) is not received by FmHA on or before the due date.

3. Borrows MAY NOT purchase a loan at a discount if they were asked to refinance (graduate) that loan at par in a letter dated on or before December 30, 1988. Borrowers MAY purchase one or more of its other loans. borrowers who receive a request to graduate will be given the right to appeal the decision if they have not previously been given that right. If the appeal results in a reversal of the request to graduate, a borrower would then be granted an extension of timeframes and conditions as described in this DPP package. Borrowers will be notified in writing by the District Office of their right to appeal the graduation decision, along with instructions outlining the procedures to be used should they decide to appeal.

4. ALL loan funds (NOT grant funds) must be fully disbursed by the FmHA Finance Office by December 27, 1988. The only exception to this will be in cases where FmHA loan funds have been set aside to fund the interest due during an interest-only period. In these cases, the loan may be purchased provided the following are accomplished prior to calculation of the discounted price of the loan:

a. Funds for payment of interest not advanced by the Finance Office are cancelled.

b. Funds for payment of interest advanced by FmHA and held by the borrower should be applied to interest accrued through the date of the DPP closing and the balance to the unpaid principal on the loan.

5. ALL of the following conditions must be met by the date of purchase:

a. All loan AND grant funds must be fully advanced to and disbursed by the borrower to pay eligible project costs or have been returned to FmHA or have been cancelled prior to final payoff.

b. The loan is evidenced by a PERMANENT DEBT INSTRUMENT.

c. The project is in operation.

d. FmHA's final inspection is completed.

e. The consulting engineer's/architect's certificate of final completion has been issued.

f. The borrower has provided written acceptance of the facility.

5. BONDS, NOTES OR OTHER OBLIGATIONS WILL NOT BE SOLD OR ASSIGN TO THIRD PARTIES UNDER THE DPP. Loans will only be sold directly to borrowers and any loan purchased at a discount will be stamped "Satisfied in Full."

6. A borrower may use existing funds, newly incurred debt, (either tax-exempt debt or non-tax-exempt debt), or any combination of the above to purchase a single loan. If any combination of tax-exempt funds and non-tax-exempt funds are used to purchase a single loan, the loan will be priced on the basis of the tax-exempt formula, as described below.

7. Borrowers may use bond escrow accounts, such as reserve, extension and improvement, redemption and others that are strictly related to the loan being purchased, to purchase the loan. If a borrower purchases only some of its loans, it MAY NOT use reserves required for the loans not purchased.

Only funds in EXCESS of the current funded reserve requirements specified in the loan security instruments may be used for the good faith deposit. any other available funding source, including any

amount of reserves in excess of those currently required in the security instruments, may be used for the Good Faith Deposit.

8. A borrower may purchase any one or more of its eligible loans. Loan obligations which have been assigned separate loan numbers but are evidenced by one debt instrument, will be treated as one loan and may not be purchased separately by a borrower. A separate pricing calculation, "Indication of Interest," and "Borrower Final Price Acceptance Form" are still required for each individual loan number evidenced by the one debt instrument. Borrowers should contact the FmHA District Office servicing the account if assistance is needed to identify the affected accounts.

II. HOW TO PARTICIPATE

Borrowers may choose to purchase their loan at a discount at any time through May 9, 1989, based on the formulas and criteria described below.

1. Borrowers who want to purchase their loans at a discount on or before March 9, 1989, may do so without making a Good Faith Deposit simply by contacting their District Office to obtain a final price and schedule a closing date.

2. Borrowers who desire to complete the purchase after March 9, 1989, must follow the instructions below:

a. Complete the enclosed "Indication of Interest" form (one for each loan to be purchased) and send it, along with a Good Faith Deposit equal to five percent of the outstanding principal balance of each of the loans to be purchased, to the FmHA District Office. This information must arrive at the District Office by CLOSE OF BUSINESS, March 9, 1989. Indications of Interest and deposits not received by then will be returned to the borrower.

b. Loan purchases may be scheduled for any date mutually agreed to by the borrower and the District Office. Except as described in I.3., above, all closings must occur on or before May 9, 1989. Borrowers must contact their District Office to obtain the final purchase price.

c. If the borrower fails to complete the loan purchase by May 9, 1989, the Good Faith Deposit will be processed as an "extra" loan payment and applied to the FINAL loan installment(s), unless the FmHA servicing

official determines that it should be applied as a regular payment in order to prevent a delinquency from occurring or for some other justifiable reason. When the Good Faith Deposit is applied to the final loan installment, the next regular payment will still be due as scheduled.

d. At the time of final payoff, the borrower will be required to sign a Borrower Final Price Acceptance Form indicating acceptance of the price (See Attachment C).

III. DETERMINING THE METHOD OF FINANCING

The type of financing used to purchase a loan is the primary factor in determining the price of the loan. A borrower may use either tax-exempt funds or non-tax-exempt funds, each of which will result in a different discount. It is the SOURCE of the funds that determine whether they are tax-exempt or not.

1. Tax-exempt funds are funds that have been derived (or will be derived), directly or indirectly, from borrowings the income on which is excludable from gross income under the Internal Revenue Code. For instance, if a borrower has on hand unused funds

remaining from a previous tax-exempt bond issue, those funds are considered tax-exempt.

The discount price of a loan that is purchased with tax-exempt funds is based on the Schedule of Certified Interest Rates, as published by the Secretary of the Treasury, without any adjustment.

2. Non-tax-exempt funds are basically any type of funds other than tax-exempt. This would include existing funds on hand that were accumulated through normal operations (systems revenues or special assessments) even if the borrower is a public body that normally issues tax-exempt debt.

The discount price of a loan that is purchased with non-tax-exempt funds is based on the price FmHA received on the loans it sold in the most recent securitized sale, adjusted for changes in the market interest rates, servicing and sales expenses, and the maturity and interest rate of the loan to be purchased.

Non-tax-exempt financing results in a higher discount to borrowers and lower price to FmHA. Because of that, all borrowers purchasing loans with non-tax-exempt funds (including funds on hand and

new debt), must agree never to replace those funds or refinance that debt with tax-exempt financing.

A borrower may use existing funds, newly incurred debt (either tax-exempt or non-tax-exempt), or any combination of the above to purchase a single loan. However, if any tax-exempt funds are used, the loan will be priced as if all the funds are tax-exempt.

Borrowers should consult with a financial advisor to determine which method of financing would be better. They should also seek legal counsel if they have any questions as to whether the source of the funds to be used to purchase a loan is tax-exempt or not.

IV. DETERMINING THE DISCOUNT PRICE

The price of each eligible loan must be calculated separately. The Pricing Factor obtained from the Pricing Grid determines the discount that will be taken on the unpaid principal of each loan. The Pricing Factor is based on the method of financing used (discussed above), whether the debt instrument associated with the loan to be purchased requires annual payments or not, the interest rate of the loan, and the final maturity of the loan.

Enclosed is a copy of the Pricing Grids that will be used to determine the Pricing Factors on all loans purchased between January 10, 1989, and February 9, 1989. FmHA will produce a ne set of Pricing Grids each month, based on new Treasury rates, that will determine new pricing Factors for closings in each of the remaining three months of the program as follows:

TREASURY RATES EFFECTIVE	CLOSING DATES
January 1, 1989	January 10 - February 9,1989
February 1, 1989	February 10 -March 9, 1989
March 1, 1989	March 10 - April 9, 1989
April 1, 1989	April 10 - May 9, 1989

New Pricing Grids based on rates for February through April will be available at the District Offices.

In planning the timing of their discount purchase, borrowers should remember that the Pricing Factors will change as interest rates change. If interest rates decline, the price will be higher (smaller discount); if the interest rates increase, the price will be lower (larger discount).

V. USING THE PRICING GRIDS

The following steps must be followed for each loan separately.

1. Select the Pricing Grid to use. There are four separate Pricing Grids. The one to use for a loan depends on the method of financing chose (tax-exempt or non-tax-exempt) and the payment frequency of interest payments (annual or other than annual) required by the debt instrument. The following matrix will help you select the correct Pricing Grid to use:

	PAYMENT FREQUENCY	
TYPE OF FINANCING	ANNUAL	OTHER
TAX-EXEMPT	GRID A	GRID B
NON-TAX-EXEMPT	GRID C	GRID D

(For example, if the loan requires semiannual, quarterly or monthly payments of interest, use Grid B or D.)

2. Determine the Final Maturity Date of the loan. This will depend on whether the loan is an AMORTIZED

loan (which requires level payments) or a PRINCIPAL PLUS loan (which requires a specified principal payment and interest on the outstanding balance).

a. Amortized Loans - The Final Maturity Date is the final regular installment due date specified int eh debt instrument.

b. Principal Plus Loans - The Final Maturity Date is the final scheduled principal installment due date that remains unpaid. If there have been extra payments applied against the end of the loan, the Final Maturity Date used to determine the Pricing Factor may be earlier than the original final scheduled installment due date.

3. Determine the Pricing Grid Maturity Date. The Pricing Grid only shows Maturity Dates of April 1 and October 1 of each year. If the Final Maturity Date matches the Pricing Grid Maturity Date, use that date. Otherwise, use the April 1, or October 1 date FOLLOWING the Final Maturity Date of the loan, as determined in Item 2 above.

4. Find on the selected Pricing Grid the Interest Rate of the loan being purchased. The Interest Rates are

listed across the top of each column. If the exact Interest Rate of a loan is not shown, use the next highest rate.

NOTE: On loans for which an Administrative Interest Rate Adjustment has been processed, the interest rate is the adjusted interest rate NOT the original interest rate stated in the debt instrument. Questions on this subject may be answered by contacting the FmHA District Office servicing the account.

5. Determine the Pricing Factor. The Pricing Factor is the decimal number that appears at the intersection of the column of the appropriate Interest Rate and the row of the appropriate Maturity Date.

NOTE: Some loans with relatively high interest rates and short terms to maturity will show a pricing factor of 1.00000. this means that no discount will apply to the purchase of this loan.

The Pricing Grids are provided only for the purpose of determining the Pricing Factor used in calculating the discount associated with the unpaid principal of each loan. The Pricing Factor IS NOT the final payoff amount. Other adjustments, such as accrued interest, delinquencies and payments in process, will effect the amount owed FmHA.

THE FINAL PAYOFF AMOUNT WILL BE DETERMINED BY THE DISTRICT OFFICE BASED ON THE STATUS OF THE LOAN ACCOUNT AS OF THE DATE OF PURCHASE. The District Office will use the Borrower Final Price Acceptance Form (see Attachment C) to calculate the final payoff amount. The borrower will have the opportunity to review the calculation and must agree to it before the loan can be purchased.

VI. SPECIAL CONSIDERATIONS

Generally, it will benefit a borrower to purchase its loan(s) if the total costs of the refinancing, including the new debt service, are less than the costs associated with the original loan.

The benefits of participating in the program will vary from borrower to borrower and from loan to loan. Any final decision to purchase a loan should be based on the following:

1. The purchase discount rate (which will depend on the method of financing, tax-exempt or non-tax-exempt, selected by the borrower),

2. Market interest rates at the time of purchase,

3. The total cost of raising the funds to purchase the loan,

4. The terms of any new debt required (there may be instances where the refinancing could be for a shorter maturity period or a higher interest rate that would increase debt service payments, possibly resulting in a rate or fee increase for users),

5. The consequences of failing to purchase the loan after submitting a Good Faith Deposit (since the Deposit is applied as an EXTRA payment, the next regular payment would still be due as scheduled, possibly creating cash flow problems for the borrower), and

6. A recent change in the tax law which may make participation in the program more attractive for certain nonprofit associates (consult a tax advisor for details).

In order to determine whether it is beneficial to participate in the DPP, FmHA strongly urges borrowers to consult with a qualified financial advisor before submitting a Good Faith Deposit.

VII. INQUIRIES

Borrowers and District Offices may obtain answers to any questions concerning the Discount Purchase Program by calling toll-free 1-800-666-7318 for assistance, between 8:30 a.m. and 4:30 p.m. (Central Time). This service will be available from January 10, 1989, through March 10, 1989. Thereafter, address questions to the FmHA District Office.

APPENDIX IV

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
GREENVILLE DIVISION

BELL ARTHUR WATER CORPORATION'S
MEMORANDUM IN SUPPORT OF ITS MOTION
FOR 7 U.S.C. §1926(B)
SUMMARY JUDGMENT ON LIABILITY
PURSUANT TO FED. R. CIV. P. 56(A)

(BESS ARTHUR WATER CORP. V. GREENVILLE, N.C. AND
IRONWOOD DEVELOPMENT, INC.,
NO. 4:95-CV-122-H(2)(E.D.E.D. NC)

Pages 55a - 57a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA EASTERN
DIVISION AT GREENVILLE, NORTH CAROLINA

BELL ARTHUR WATER CORPORATION,	)))NO. 4:95-CV-122-H(2))
Plaintiff	)BELL ARTHUR WATER)CORPORATION'S)MEMORANDUM IN
vs.	)SUPPORT)OF ITS MOTION FOR
GREENVILLE UTILITIES COMMISSION, CITY GREENVILLE, N.C. and IRONWOOD DEVELOPMENT	)7 U.S.C. § 1926(b))SUMMARY JUDGMENT ON)LIABILITY PURSUANT TO)FED. R. CIV. P. 56(a)))
Defendants.	)

NOW COMES Bell Arthur Water Corporation ("BAWC"), Plaintiff, by and through counsel, and files BAWC's Memorandum in Support of BAWC's Motion for 7 U.S.C. § 1926(b) Summary Judgment On Liability

Pursuant to Fed. R. Civ. P. 56(a) against Defendants Greenville Utilities Commission ("GUC"), the City of Greenville ("the City") and Ironwood Development, Inc. ("Developer"). BAWC asserts the U.S. Government's position in this case is supportive of such relief for reasons set forth below.

RULE 10(c) INCLUSION BY REFERENCE

Plaintiff includes by reference pursuant to Rule 10(c), its factual allegations of its:

1. BAWC'S First Amended Verified Complaint for Declaratory Judgment and Permanent Injunction (Docket No. 50);

2. BAWC'S Application for Preliminary Injunction Pursuant to F.R.C.P. 65 Against Defendants Greenville Utilities Commission and the City of Greenville, N.C. [Frog Level Area] (Docket No. 37);

3. BAWC Motion for 7 U.S.C. § 1926(b) & 42 U.S.C. § 1983 Summary Judgment on Liability Pursuant to F.R.C.P. 56(c) filed april 24, 1996 (Docket #28);

4. BAWC Memorandum in Support of Its Motion for 7 U.S.C. § 1926(b) and 42 U.S-.C. § Summary Judgment on Liability Pursuant to F.R.C.P. 56(c) filed April 24, 1996 (Docket No. 29);

5. BAWC Exhibits Referenced in BAWC'S Memorandum in Support of Its Motion for 7 U.S.C. § 1926(b) & 42 U.S.C. § 1983 Summary Judgment on Liability Pursuant to F.R.C.P. 56(c) filed April 24, 1996 (Docket No. 30); and

6. Attachment 1, Historical Background. Further, to aid this Court, Plaintiff has prepared and includes here by reference its Statement of Undisputed Material Facts ("FACTS").

CLAIM FOR RELIEF

BAWC brought this action against Defendants pursuant to 7 U.S.C. § 1926(b), a part of the Consolidated Farm and Rural Development Act of 1961 ("CFRD").[1]

---

[1] Additionally, BAWC's federal loan based claim is supported by the Agricultural Credit Act of 1987 ("ACA"), Pub. L. 100-233 (1988), Title VIII, Section 803 (f) ***[Right of First Refusal]*** & (g) ***[Extension of Non-Impairment Protection of 7 U.S.C. § 1926(b)]***, which amended Section 1001 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), Pub.L.No. 99-509.

APPENDIX V

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

REPLY TO PLAINTIFF'S RESPONSE TO CITY'S MOTION FOR SUMMARY JUDGMENT

(RURAL WATER SYSTEM #1 V. CITY OF SIOUX CENTER, IOWA, CIV. NO. C95-4112-MWB (N.D.W.D. IA))

Pages 59a - 63a

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

RURAL WATER SYSTEM #1, an Iowa Non-Profit Corporation	)	Civil No. 95-4112-MWB
Plaintiff	)	
v.	)	
CITY OF SIOUX CENTER, IOWA,	)	REPLY TO PLAINTIFF'S RESPONSE TO CITY'S MOTION FOR SUMMARY JUDGMENT
Defendant	)	

COMES NOW THE DEFENDANT, City of Sioux Center, and files the following reply to the Response to Motion for Summary Judgement filed by the Plaintiff.

TABLE OF CONTENTS

Questions under 7 U.S.C §1926(b). 1
Tenth Amendment Problems 4

Duty to Serve Customers 5
Inverse Condemnation 6
Statutory Interpretation 6
Conclusion 7

1. Questions under 7 U.S.C. §1926(b).

Despite the voluminous amount of paper filed in conjunction with these cross motions for summary judgment, the heart of this dispute in this case rests on a fairly narrow issue: Was plaintiff protected by 7 U.S.C. §1926(b) during the period between September 22, 1988 and July 1, 1992? It is during this period that the City of Sioux Center annexed the disputed territory. Under state law Sioux Center is legally entitled to serve in the disputed area and plaintiff is in fact prohibited from serving within two miles of Sioux Center's city limits without the City's permission. *See* Iowa Code §357A.2. In short, if plaintiff continued to be protected by §1926(b) when it was not indebted to the United States, then Sioux Center's actions violate the section. But if plaintiff did not enjoy the projections of §1926(b) from 1988 to 1992, then the actions of Sioux Center were lawful and Sioux Center is entitled to the right to exclusively serve the area within two miles of its city limits as they existed on July 1, 1992.

To resolve this issue, the court must determine whether a debtor who paid off its FmHA debts under the federal buy out program falls within the purview of 7 U.S.C. §1929a note, subsection (g). (The characterization of the transaction as a "refinance" or a "repurchase" or a "sale" is irrelevant -- the federal debt is extinguished in any case). There are only two published decisions that have considered the issue. *See Scioto Regional Water Dist. No. 1 v. Scioto Water Dist., Inc.*, 95-3918, U.S. App. Lexis 33031 (6th Cir. Dec. 18, 1996); *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo. 1995). Sioux Center has previously articulated its position that the Sixth Circuit correctly analyzed the statutory scheme in the *Scioto* case, a case decided less than two months ago.

Rural Water System attempts to counter *Scioto* with a bound of "legislative folio" which purports to demonstrate that the legislative history supports its position. Were the court to wade through this mountain of material it would discover that despite plaintiff's numerous protestations to the contrary, the legislative history says absolutely nothing about the issue before the court.[1]

---

[1]This point was also made by Judge Beckwith in her *Scioto Water* district court opinion: "Defendant has also cited portions of the legislative history. However, the legislative history does not provide any insight with regard to the specific issue before the court." *See* slip opinion attached to Sioux Center's brief in resistance to plaintiffs' motion for summary judgment at 12 n.6.

Plaintiff also cites numerous authorities, ranging from state and federal cases to the Old Testament, to bolster its interpretation of the statutory scheme. Again, none of these authorities have anything relevant to say about the issue before the court. The only federal case which *has* analyzed the precise issue before this court, the *Scioto* case, was not even mentioned in plaintiff's initial brief despite the fact that it had been decided two weeks before plaintiff submitted its initial summary judgment brief to this court and despite the fact that counsel for plaintiff, Mr. Rosenberg, appeared as counsel of record in both brief and argument in the *Scioto* case. After Sioux Center identified the *Scioto* case in its summary judgment brief, plaintiff devoted a total of three paragraphs out of a thirty-seven page resistance brief to the *Scioto* case. Plaintiff argues that the *Scioto* case should be disregarded because the Sixth Circuit failed to follow its own rules of statutory construction, and, bafflingly, that the Sixth Circuit "erroneously relied on common law" in reaching its decision. *See* plaintiff's resistance brief at 24. The *Scioto* decision is not in error. Sioux Center urges the court to follow the reasoning of the Sixth Circuit and hold that the projections of §1926(b) do not apply to one-time debtors like plaintiff who extinguished their federal debt under the buy-out program, and therefore, that plaintiff was not protected by

§1926(b) during the period from September 22, 1988, through July 1, 1992.[2]

---

[2] As discussed in an earlier brief the Department of Agriculture also takes the position that former borrowers that who have paid off FmHA loans under the debtor buy-out program are not covered by the projections of section 1926(b). If the court finds that the statutory scheme is not clear it must defer to this agency interpretation so long as the interpretation is a permissible construction of the statute. *See Chevron, U.S.A., Inc. v. Natural Defense Council, Inc.*, 467 U.S. 837, 843-44.